IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Civil Writ Petition No.854 of 2001.

Judgment Reserved on:29.12.2006.

Date of decision:08.01.2007.

Sunita Devi ….**Petitioner**

Versus

Union of India and Others ….**Respondents**

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The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting ?[1]

For the Petitioner: **Mr.P.P. Chauhan, Advocate.**

For Respondents 1 to 3: **Mr.M.A. Khan, Central Government Counsel.**

For Respondent No.4: **Mr.Vishal Panwar, Advocate vice Mr.Manoj Chauhan, Advocate.**

Dev Darshan Sud,J.

The petitioner is the wife of Shri Subhash Chand, who was enrolled as a Sepoy/Washerman in the Indian Army. The case of the petitioner is that her husband, who was assigned Army No.14915684 and was posted in the Infantry Unit which was actively engaged in operational duties in Jammu & Kashmir, was granted leave from 7.1.1995 to 7.3.1995. After availing leave, the husband of the petitioner is alleged to have returned to his Unit. He was

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement*?**

travelling by bus to rejoin his Unit and was seen off by his father from the bus stop at Nadaun.

A communication dated 29.3.1995 (Annexure P-1) was received from the Army Authorities, which stated that the husband of the petitioner had over-stayed his leave w.e.f. 8th March, 1995. This communication is addressed to the District Magistrate, District Hamirpur and states that,

> "please take early step to apprehend the above named absentee and inform to this unit immediately quoting locality in which the absentee is being detained. On receipt of this information action will be taken to bring to the absentee".

Copies of the communications have been endorsed and sent to the Police Station, Nadaun, wife of the petitioner and records of the Rajput Regiment, Fatehgarh (UP) etc. A detailed representation (Annexure P-2) was made by the father of the petitioner, wherein a grievance has been made by him that his son is not traceable and has requested the personal intervention of the Hon'ble Governor, Jammu & Kashmir. He further states that he apprehends that his son has been missing somewhere when he was on active duty or may have been killed by terrorists etc. Daily Diary Report (Annexure P-3) was also lodged by the brother of the petitioner with Police Station, Nadaun, regarding the fact that the husband

of the petitioner was missing and was not traceable. Vide an order dated 4th July, 1995 (Annexure P-4), Apprehension Roll was issued by the Company Commander of 21 Rajput, where the husband of the petitioner was posted. This is addressed to the Police Station, Nadaun and copy whereof is endorsed to the Senior Superintendent of Police, District Hamirpur and also to the petitioner. The Apprehension Roll states that Subhash Chand was still absent from the Unit, his wife is facing deep hardship and the Police Authorities were asked to take effective steps to trace out him. This is followed by a number of representations and communications which have been placed on the record. All these documents have not been referred to in detail since they reproduced the earlier pleas made on behalf of the petitioner to trace her husband and also to provide her with assistance. Ultimately a Court of Inquiry was held and the proceedings have been placed on the record as Annexure R-1 with the reply. It was held that the husband of the petitioner was declared as a deserter w.e.f. 8th March, 1995. The natural consequence was that the dependants of Shri Subhash Chand were deprived of all the benefits which would otherwise be available to him on his leaving army service. The documents on the record show that the petitioner has been regularly pleading with the respondents to provide her with assistance, but such request has

been turned down on the ground that the husband of the petitioner is a deserter.

I have heard learned counsel for the parties and have gone through the record. The petitioner prays that she be given compassionate appointment, and further a direction be issued to the respondents to release Special Family Pension, Death-cum-Retirement Gratuity, AFP Fund, Army Group Insurance Maturity benefits and all benefits payable on the retirement of a soldier alongwith interest.

Learned Counsel for the respondents submits that the record conclusively establishes that the petitioner is a deserter and is not entitled to any of the benefits.

Learned counsel for the petitioner has placed reliance on three judgments of this Court, namely, ***Sunehru Devi*** *vs.* ***Union of India and others, Latest HLJ 2005(HP)(DB) 885***, ***Smt.Kanta Devi*** *vs.* ***Union of India and others, 1998(2) Shim.L.C. 415*** and ***Smt.Sandhaya Devi Parmar vs. Union of India and others, 1997(2) Sim.L.C.310,*** in support of his contention that the petitioner would be entitled to all the benefits payable to her in the event of her husband leaving the army or retiring. On going through the record of the Court of Inquiry, it appears that the husband of the petitioner has not rejoined duty but there is nothing to show that there was *animus deserendi* to leave the service

permanently. Coupled with the fact that nobody has heard about his whereabouts till date, mere absence from duty would not lead to the conclusion that the husband of the petitioner was a deserter. Thus, there can be no doubt whatsoever that these findings cannot be sustained.

Desertion has been defined to mean:

> "The willful and unjustified abandonment of a person's duties or obligations, esp.to military service or to a spouse or family…….."
> ***(P.Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition 2005,Volume-2, Page-1343, D-1).***

The Court of Inquiry has found that the belongings of the husband of the petitioner were in the Unit and no fire arm had been issued to him. These factors clearly indicate that the petitioner has gone missing after he left for his Unit and was not a deserter as held by the respondents, more-so, when the belongings of the husband of the petitioner, including his clothes, were lying in the Unit itself. There is no question of the husband of the petitioner having *animus deserendi* to desert the Unit. The respondents have acted in haste in concluding that the whereabouts of the petitioner cannot be traced at all, rather no sustainable effort has been made to trace him out. A period of more than eleven years has elapsed and the petitioner has not been traced.

In ***Sandhaya Devi Parmar's*** case, this Court, under similar circumstances, has held that the authorities ought to have initiated the necessary steps to find out as to whether the husband of the petitioner therein had met with an accident or anything else had happened to him. Moreover, when it was found that the belongings of the petitioner were lying with the Unit no inference of desertion could be raised. Direction was issued to consider the case of entitlement of the petitioner for family pension and other benefits.

In ***Kanta Devi's*** case, this Court was considering the case of one Shri Sansar Chand who had been enrolled in the Army, had put in more than 10 years of service. He had also not rejoined his Unit and was declared a deserter. It was found as a fact that the husband of the petitioner was found wandering in the street of Trivandrum and had been admitted in Mental Hospital. In these circumstances, this Court held that no inference of desertion could be raised. Referring to some decisions of this Court as also the House of Lords in ***Moore*** *vs.* ***Canadian Pacific Steamship Co., 1945-1 All E.R. 128***, it was h eld that the *animus* must be determined before a person can be declared as a deserter.

Similarly, in ***Sunehru Devi's*** case, the petitioner had not rejoined his Unit for a period of more than ten years. This Court held that a

presumption under Section 108 of the Evidence Act regarding the death of a person, who has not been heard of for more than seven years, can be raised.

I do not see any reason to differ from these judgments. The submissions of the respondents that the Court of Inquiry conclusively establishes that the husband of the petitioner is a deserter cannot be accepted. In-fact, such a presumption cannot be raised, more especially in view of the fact that the belongings of the petitioner were lying at his Unit.

The case of the petitioner is squarely covered by the ratio of the judgments relied upon by the learned counsel for the petitioner.

The writ petition is, accordingly, accepted. The order Annexure P-23 is quashed and set aside. The respondents are directed to release to the petitioner all the dues which would be payable to her husband as if he was not a deserter. So far as the question of compassionate ground is concerned, it would be open to the respondents to consider the same in accordance with law. The writ petition is, therefore, disposed of. There shall be no order as to costs.

January 8,2007 **(Dev Darshan Sud)**
(aks) **Judge.**